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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1408

LOUIS R. JONES and BILLY DON THOMPSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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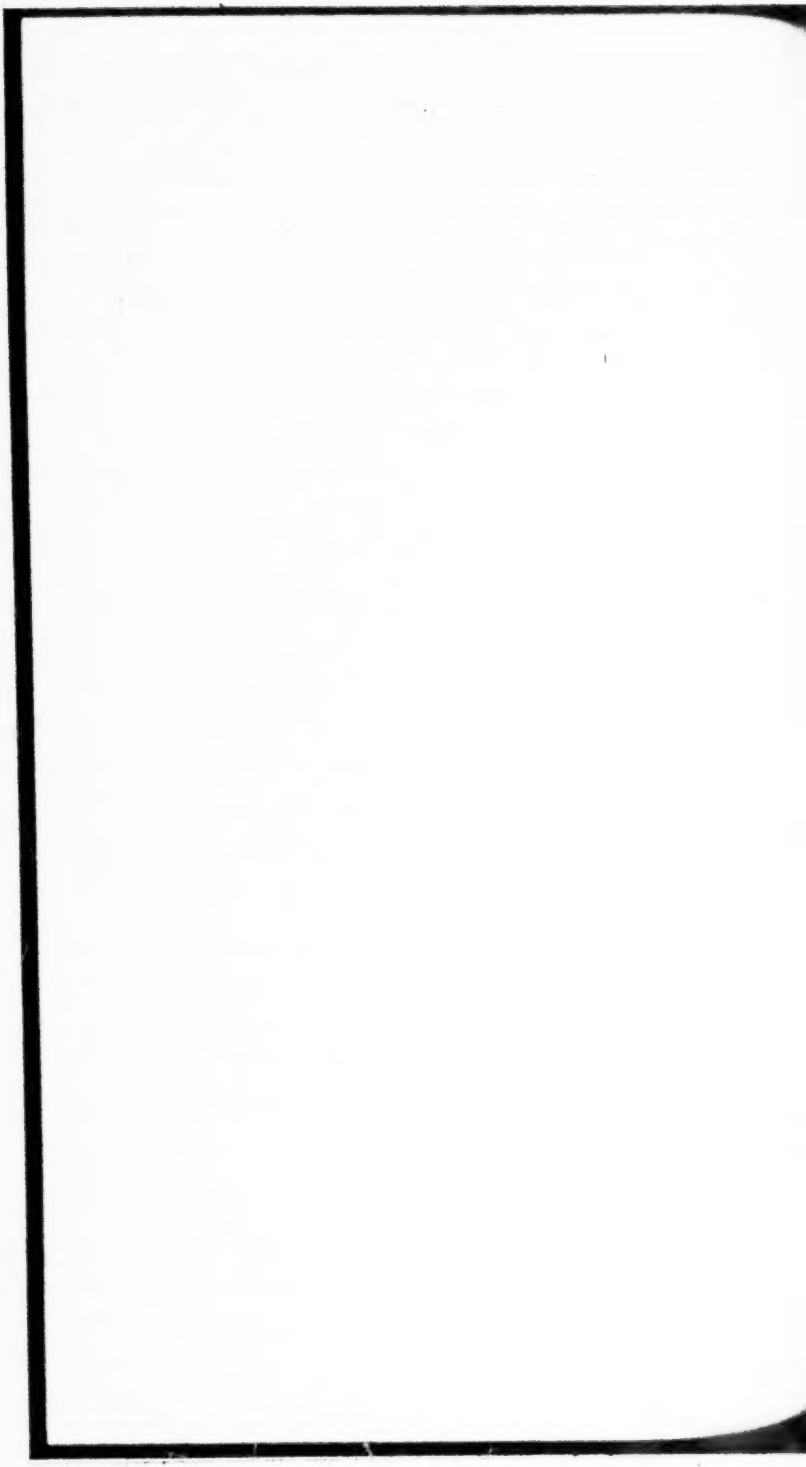

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To THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 24, 1969, affirming the judgment of record rendered in the United States District Court for the Western District of Arkansas, wherein the District Court denied, without a hearing, a motion to vacate judgment and sentence presented to said sentencing Court pursuant to 28 U.S.C. Section 2255, 28 U.S.C.A. Section 2255.

I

OPINIONS BELOW

The opinion filed by the United States District Court for the Western District of Arkansas denying, without a hearing (post conviction relief), is set forth in the record (Tr. ....) and is appended hereto (see Appendix A).

The opinion sought to be reviewed was entered by the Court below on December 24, 1969, and is not as yet understood as being officially reported but is set forth in the Appendix (See Appendix B).

II

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 24, 1969; petition for a rehearing was timely filed and was denied on January 23, 1970 (Tr. 20); order staying mandate for thirty days, etc., was entered on January 23, 1970 (Tr. 21); notice of filing of petition for Writ of Certiorari was presented to the Clerk of the Court below and the records (two volume certified transcript) was on January 28, 1970, forwarded to the Clerk of this Honorable Court (Tr. 22).

The time in which to file the Petition for Writ of Certiorari is governed by Title 28 U.S.C. Section 2101(c)—*Heflin* v. *United States*, 358 U.S. 415, and Rule 22(3) of the Revised Rules of this Honorable Court; the ninety days period as provided for by 28 U.S.C. Section 2101(c) was enlarged by the Honorable Byron R. White, Associate Justice, extending the time to and including April 24, 1970, in which to file the Petition for Writ of Certiorari (see Appendix C)).

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Accordingly, this Honorable Court has jurisdiction to review the judgment of the United States Court of Appeals for the Eighth Circuit pursuant to Title 28 U.S.C. Section 1254(1).

III

STATEMENT OF THE CASE

An information in two Counts was filed against petitioners charging them with burglary of a bank under Count one and larceny of money exceeding $100.00 under Count two, in violation of 18 U.S.C. Section 2113(a)(b) (Tr. 1).* The proceedings on the information in the sentencing Court commenced on January 8, 1968, and appears in the reporter's transcript (Tr. 1 through 13).

It further appears (Tr. 14) that the District Court then proceeded to take up and consider some indictments under Rule 20. The first was from the Northern District of Texas charging a violation of 18 U.S.C. Section 2312 (Tr. 15) transporting an automobile from the Northern District of Texas. The second was from the Eastern District of Missouri charging Louis Ray Jones, individually, with the intent to defraud the United States in that he did knowingly present and utter to the United States Post Office at St. Louis, Missouri, a certain forged counterfeited postal money order in the amount of $100.00 in violation of 18 U.S.C. Section 500 (Tr. 21).

The records of proceedings in the trial court shows that petitioners entered pleas of guilty and were committed to the custody of the Attorney General for a period of twenty (20) years on the two Count information. They

*Tr. gives reference to pages in the typewritten transcript of the Official Court Reporter.

were given additional sentences under the indictments under *Rule 20 Fed. Rules of Crim. Proc.*, to be served concurrently with the sentence of twenty years (Tr. 33 through 48).

IV

STATEMENT OF FACTS

On February 2, 1968, petitioner (Billy Don Thompson) filed motion to vacate sentence and for leave to withdraw his pleas of guilty and/or for reduction of sentence pursuant to Rule 35 Fed. Rules of Crim. Proc., which was denied without a hearing.

On June 3, 1968, petitioner (Louis R. Jones) filed a motion pursuant to 28 U.S.C. Section 2255 alleging numerous grounds for relief which he claimed violated his constitutional rights as guaranteed to him by the Fifth and Sixth Amendments to the United States Constitution. The motion was denied by the sentencing Court without a hearing.

These two above mentioned motions were not properly drafted for the reason that neither of the petitioners were experienced laymen in law and it was their first appearance in a federal Court at time of sentencing.

Thereafter, petitioners sought the advice of an experienced brief writer who was educated in law and understood federal criminal law and proceedings that could be instituted for (post-conviction relief). 28 U.S.C. Section 2255.

After careful study of the record of the sentencing Court petitioners were advised that they were entitled to file a motion pursuant to 28 U.S.C. Section 2255 on the grounds that the sentencing Court had violated their con-

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stitutional rights to be properly advised of their constitutional rights to plead not guilty to the information and have a trial before a jury, the right to be advised of the statutory maximum punishment under the Bank Robbery Act (18 U.S.C. Sections 2113(a)(b)) as well as to be informed of the nature and cause of the accusation, as well as the right to enter a plea of not guilty to the indictments under Rule 20, Fed. Rules of Crim. Proc. The motion to vacate judgment and sentence was prepared and filed with the sentencing Court. The United States Attorney filed an answer, not on the merits, but on the grounds that petitioners had filed numerous other motions and the present motion should be denied under the doctrine of res judicata. Petitioners filed a traverse to the United States Attorney's answer alleging that this Honorable Court had ruled that the doctrine of res judicata does not apply in a Section 2255 proceedings. *Heflin* v. *United States*, 358 U.S. 415. The sentencing Court entered an order on the basis that numerous prior motions had been filed and without any express findings of fact or conclusions of law summarily denied the motion without a hearing.

V

STATUTES INVOLVED

Act of June 28, 1948, C. 646, 62 Stat. 967, as amended May 24, 1949, C. 139, Sec. 114, 63 Stat. 105, *28 U.S.C. Section 2255.*

28 U.S.C. Section 2255 provides in pertinent part as follows:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to

be served upon the United States Attorney, *grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.*" (Emphasis supplied).

18 U.S.C. Sections 2113(a)(2) and (b) is set out in the Appendix (see Appendix D).

VI

FEDERAL RULES INVOLVED

Rule 11 Federal Rules of Criminal Procedure provides as follows:

"A defendant may plead not guilty, guilty or, with the consent of the Court, nolo contendere. The Court may refuse to accept a plea of guilty, *and shall not accept such plea* or a plea of nolo contendere *without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.* If a defendant refuses to plead or if the Court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty. The Court shall not enter a plea of guilty unless it is satisfied that there is a factual basis for the plea." As Amended Feb. 28, 1966, eff. July 1, 1969. (Emphasis supplied).

Rule 20 Federal Rules of Criminal Procedure (a)(b) and (c) (see Appendix E).

VII

PROVISIONS OF CONSTITUTION INVOLVED

United States Constitution Amendment Five provides in pertinent part as follows:

"*No person shall* be held to answer for a Capital or other infamous crime unless on a presentment or in-

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dictment of a Grand Jury, * * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process* of law; * * *." (Emphasis supplied).

United States Constitution Amendment Six provides as follows:

> *"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis supplied).

Article 1, Sec. 8, Clause 18, 10th Amendment.

VIII

QUESTIONS PRESENTED

1). When a prisoner seeks post-conviction relief pursuant to 28 U.S.C. Section 2255 and the sentencing transcript clearly shows that the presiding judge did not advise the accused that he had the right to plead not guilty to the information and have a trial before a jury or that the jury could be waived and the case would be tried to the Court sitting without a jury and erroneously advises the accused of the maximum penalty, may the sentencing Court summarily deny the Section 2255 motion without a hearing of the evidence and testimony of the accused?

2). Where an information is drawn under 18 U.S.C. Section 2113(a) subdivision (2) attempting to charge larceny, but fails to charge that such larceny was a larceny in violation of the laws of the United States,

may the sentencing Court proceed to enter judgment and sentence on the theory that it was a larceny contrary to some law of the United States?

IX

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Eighth Circuit is an erroneous decision and so far departs from the usual course of judicial proceedings as to call upon this Honorable Court's power of supervision.

The District Court Must Grant a Hearing Unless the Allegations of a Motion under Section 2255 Are Conclusively Refuted by the Record

The applicable rule of law is not in doubt and it was in fact accepted by the sentencing Court and the Court of Appeals below.

In a proceeding under Section 2255, where the motion raises substantial issues of fact which are not of a type that can be conclusively refuted by the record, the District Court must grant a hearing no matter how spurious the allegations appear to be and no matter how remote the chance that movant can prove them, *United States* v. *Hayman*, 342 U.S. 205, 219-220, 72 S.Ct. 263, 273. The mandatory nature of this requirement of a hearing is well illustrated by *United States* v. *Rutkin*, 212 Fed. (2d) 641 (3rd Cir. 1954). Rutkin had been convicted of income tax evasion. In moving to set aside the sentence, he charged that the prosecutors had knowingly used perjured testimony and had deliberately suppressed evidence favorable to appellant. The District Court denied relief without a hearing. The Court of Appeals obviously thought little of the merits of Rutkin's charge. But the Appellate Court reversed for a hearing, stating:

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> "Nevertheless, the language of the statute is strong and imperative. It provides that the sentencing Court shall grant the prisoner a hearing on his motion '(U)nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. * * *' ". (212 Fed. (2d) at 644).

The "imperative" requirement of a hearing is also illustrated by *Ziebart* v. *United States*, 185 Fed. (2d) 124 (5th Cir. 1950). (The District Judge's denial of a Section 2255 motion, without a hearing, *reversed* where the prisoner alleged that he pleaded guilty pursuant to an agreement with the prosecutor that he would receive a light sentence, that he did not waive his right to counsel, and that he did not plead guilty intelligently.) See also the Court of Appeals for the *Eighth Circuit* decision in *Davis* v. *United States*, 210 Fed. (2d) 118 (8th Cir. 1954), where a prisoner sought relief on the ground that he had not been informed of his right to counsel. The motion was denied without a formal hearing on the basis of ex parte affidavits and the Judge's recollection "that the petitioner was fully apprised of his right to have counsel . . . ." The Court below (in the *Davis* case, *supra*), however, held that ex parte evidence could not take the place of the hearing required by statute, and it reversed for a hearing with the following pertinent statement:

> "Observation and experience compel the conclusion that in many instances allegations such as those now under consideration are not honestly made and constitute barefaced perjury. In many other instances lapse of time and wishful thinking ripen into a conviction that events were as alleged, when in fact they were not. But however onerous the burden may be, the protection of the rights of persons in the comparatively few meritorious cases requires the careful adherence to our traditions of judicial proceedings in all cases, in order that the few may be discovered." (210 Fed. (2d) at 122-123).

In the case at bar the District Court had before it a motion presented pursuant to 28 U.S.C. Section 2255 attacking the sentence on the grounds that the plea of guilty was involuntary in that petitioners understood they had to plead guilty after waiving indictment and consenting to be prosecuted by information. They did not know or understand they had the right to plead not guilty to the information and did not know or understand they could have a trial by jury on the information /or/ that they could plead not guilty to the information and waive trial by jury and be tried to the Court sitting without a jury. At no time did the sentencing Judge advise petitioners of the aforesaid mentioned constitutional rights secured to them by the Bill of Rights.

The Court of Appeals below held (Slip Op. p. 5), that Rule 11 Federal Rules of Criminal Procedure does not encompass such rights to be advised of the right to plead not guilty to an information, the right to trial by jury /or/ the right to waive a jury trial and be tried to the Court sitting without a jury; the Court below stated:

> "The defendants contend they should have been specifically informed of their right to plead not guilty. This is not required by Rule 11, but defendants knew of this right and it was further made clear to them by their counsel, by the Judge when he informed them of their right to stand mute and to say nothing which could be used against them, and by implication when he asked the question, 'How do you plead?' " (Slip Op. p. 5).

Petitioners believe that the statement in the (*Davis* case, *supra*) is the law of the Court below which governs this case. The District Court here apparently agreed to the general principle, for it denied the motion only because it believed that the files "conclusively" showed petitioners were not entitled to relief. It is this conclusion which petitioners believed to be in error.

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2. The decision of the Court of Appeals below holding (that petitioners' allegations that they were not properly advised of their constitutional rights), is not such rights encompassed by Rule 11, is error.

A Hearing Was Mandatory in the Present Case

The records do not conclusively refute, but rather support the allegations that petitioners were not properly advised by the sentencing Court and that their pleas of guilty resulted from their belief that they could not plead not guilty after signing a waiver of indictment and agreed to prosecution by information.

If petitioners did not understand that they had the constitutional right to trial by jury, after waiving indictment, it is obvious that they did not understand a not guilty plea could be entered to the information and the plea of guilty was involuntary and a hearing should have been held by the District Court for a determination of the voluntariness of the guilty plea. See, e.g., *Durant* v. *United States*, (1st Cir. 1969), 410 Fed. (2d) 693, the Court stated:

> "* * *. Accordingly, the procedure followed as to *Halliday*, *Halliday* v. *United States*, 380 Fed. (2d) 270 (1st Cir. 1967) viz., *a hearing before another judge* to determine whether his plea was in fact voluntarily made even though the Court had not informed him as to the unavailability of parole, should be adopted. *The burden as to voluntariness is, of course, upon the government.*" (410 Fed. (2d) at 693) (Emphasis supplied).

In addition, the record fails to show any mentioning that petitioners had the right to plead not guilty and have a trial before a jury /or/ that they could waive the jury and be tried to the Court. Such constitutional rights may not be dispensed with unless the record clearly shows that petitioners were so advised and that they knowingly

and intelligently waived such rights. *Johnson* v. *Zerbst*, 304 U.S. 458. Mr. Justice Black delivered the opinion in the *Zerbst* case stating as follows:

> "'* * * Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and * * *' *we do not presume acquiescence in the loss of fundamental rights. . . .*" (304 U.S. at 464) (Emphasis supplied).

A plea of guilty to be the basis for a valid conviction must be made voluntarily *after proper advice and with full understanding of the consequences. Kercheval* v. *United States*, 274 U.S. 220-223; *United States* v. *Lias*, (4 Cir. 1949), 173 Fed. (2d) 585. Otherwise the conviction is subject to collateral attack. *Waley* v. *Johnston*, 316 U.S. 101; *United States* v. *Davis*, (7 Cir. 1954), 212 Fed. (2d) 264; *United States* v. *Schneer*, (3 Cir. 1952), 194 Fed. (2d) 598.

Where issues of fact are raised by a motion for relief from a conviction, the motion cannot be denied without a hearing. *United States* v. *Hayman*, 342 U.S. 205; *Herman* v. *Claudy*, 350 U.S. 116; *Waley* v. *Johnston*, 316 U.S. 101; *United States* v. *Davis*, 212 Fed. (2d) 264; *Motely* v. *United States*, 230 Fed. (2d) 110.

3. The District Court below found that it could sentence petitioners to a maximum term of thirty years under Sections 2113(a) and 2113(b) (Tr. 3); and the sentencing Judge again stated (Tr. 9) that it was possible for him to sentence petitioners to maximum terms of thirty years. The Court of Appeals below found that the District Court did err in its statement to petitioners that the sentence could be a maximum of thirty years (Slip Op. p. 6, para. 3). However, the Court below stated that petitioners were not prejudiced by the judge's error in advising them as to the maximum punishment. The sentencing Judge stated:

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"Now as I stated before it is possible for each of you should you plead guilty to both charges that a maximum fine of $10,000.00, $5,000.00 in each case could be assessed against you and imprisonment of 30 years could be assessed against you, 20 years on Count One and ten years on Count Two; * * *". (Tr. 9).

It is respectfully urged here that petitioners were entitled to know the correct maximum sentence that could be imposed prior to entry of the plea of guilty. The sentencing Court did not, even though the defense attorney had called such error to the attention of the Court, rule upon the question as to the maximum punishment prior to accepting the plea of guilty (Tr. 1 through 25 of the Reporter's Transcript of January 8, 1968).

Then on January 26, 1968, the sentencing Court below proceeded to impose sentence and stated that:

"and Mr. Jesson, in view of the fact that these sentences all run concurrent, *it won't be necessary for me to rule on the matter of law as to whether or not your contention was correct when you were trying to hold the possible sentence at a minimum.*" (Tr. 41) (Emphasis supplied).

It is respectfully urged here that the sentencing Judge was still under the impression that he could impose a thirty year sentence and at no time did he properly advise petitioners of the correct maximum punishment as required by Rule 11, Fed. Rules of Crim. Proc. See e.g., *Durant* v. *United States, supra,* 410 Fed. (2d) 689, the Court holding:

"Next, the government advances the argument made in *Smith* that the defendant plead guilty knowing that he could be sentenced to a maximum of eight years on the four counts of the indictment; that the effect of parole, even if available on his maximum sentence, would have been far in excess of the five year

sentence actually imposed. Inexplicably the government fails to develop this argument. *If its intention is to show lack of prejudice we reject it.* Under Rule 11 the defendant is entitled to know the consequences of his plea before entering it. (Footnote-infra). This mandate is not nor can it be satisfied by hindsight reasoning comparing the actual sentence with what it could have been. (Footnote-infra). The language of the rule is clearly designed to enable a defendant to assess the risk that he is taking by entering a plea of guilty." (Footnote-infra). (410 Fed. (2d) at 691-692) (Emphasis supplied).

In the case at bar the sentencing Court's statement that the maximum punishment was thirty years was misleading and coercive in nature and prejudiced petitioners' position before the Court, where, as here, they did not understand they had a right to enter a not guilty plea to the information and have a trial before a jury. On the question of waiver of fundamental constitutional rights, see, *Johnson* v. *Zerbst*, 304 U.S. 458, Mr. Justice Black speaking for this Court said: "That a waiver is an intentional relinquishment and abandonment of a known right and privilege and it would be fitting and appropriate that such waiver appear upon the face of the record." (304 U.S. 458, at p. 464).

In the instant case petitioners were unaware of their constitutional rights to trial by jury on the information. An effective waiver of a constitutional right can only occur where the accused speaks after becoming aware of the right and cognizant of the consequences of foregoing it. Cf. *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966).

4. The decision of the Court of Appeals below holding that the sentencing Court need not properly advise petitioners in a Rule 20 Proceedings is error. In *Rimanich*

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v. *United States,* (5 Cir. 1966), 357 Fed. (2d) 537, the Court of Appeals held that:

> "The transcript of the proceedings at appellant's arraignment and sentencing discloses that appellant was accompanied by his retained Counsel but that colloquy concerning the guilty plea transpired among the Court, Counsel and Appellant. Although no formal procedure and no explicit findings are required, *something more than the presence of counsel and the statement that the defendant pleads guilty is needed to satisfy the mandate of Rule 11.* See e.g., *Munich* v. *United States,* 337 Fed. (2d) 356 (9 Cir. 1964). Explicit questioning of a defendant before the acceptance of a guilty plea not only helps to insure that the plea is indeed being entered voluntarily and knowingly but it also greatly eases the task of the Courts in a subsequent Sec. 2255 proceeding. Rule 11 not having been complied with, the burden was on the Government to show that appellant entered his plea voluntarily." (357 Fed. (2d) at 538) (Emphasis supplied).

This was the first appearance of either of the petitioners in a federal Court and they did not even know the Federal Rules of Criminal Procedure existed and did not know the Sixth Amendment guaranteed to them a trial by jury if they waived the indictment and consented to prosecution by an information. They did not know they could withdraw the Rule 20 consent and at no time did the sentencing Court properly advise them, where, as here, the Rule 20 Consent was signed out of the presence of the Court and they thought there was only one plea that could be entered and that would be guilty.

In *Rimanich* v. *United States, supra,* 357 Fed. (2d) 537, the Court in reversing a District Court in a case where the facts are identical with the facts in the case at bar, held:

> "The record presents appellant's uncontradicted testimony *and he was unaware that he could withdraw his Rule 20 Consent;* he believed that by signing the form he had entered a plea that could not be changed. Moreover, although appellant's counsel did not recall appellant's ever asking him if he could withdraw the Rule 20 Consent ('It's possible, yes (but) I don't remember it.'), *he never informed appellant of this right.*" (357 Fed. (2d) at 538-9). (Emphasis supplied).

It is respectfully submitted that the order of the sentencing Court denying, without a hearing, the Section 2255 motion was based on the filing of two other post-conviction motions, viz., (1) a motion of petitioner Billy Don Thompson seeking leave to withdraw his pleas of guilty and for reduction of sentence at the time he was incarcerated in the County Jail within the jurisdiction of the sentencing Court and (2) a motion of petitioner Louis Ray Jones seeking a hearing on a Section 2255 motion on facts other than presented in the present motion from which the appeal was taken to the Court below. The Court of Appeals below undoubtedly rejected the sentencing Court's theory as to res judicata in that the United States Attorney argued in the Court below that petitioners had filed numerous other motions and it was on such basis that he urged that the order denying, without a hearing, the present motion from which Certiorari is sought to review the Court of Appeals' judgment of affirmance of the sentencing Court's order denying, without a hearing, the Section 2255 motion.

Petitioners respectfully submit that a hearing was mandatory in the case at bar in that the records and files did not conclusively show that petitioners were not entitled to relief. *United States* v. *Hayman, supra,* 342 U.S. 205, this Honorable Court in its reversal of the *Hayman* case, *Hayman* v. *United States,* 187 Fed. (2d) 456, stated:

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"We do not find Section 2255 the disturbing inadequacies found by the Court below. The issues raised by respondent's motion were not determined by the 'files and records' in the trial Court. In such circumstances Section 2255 requires that the trial Court act on the motion as follows: '. . . *Cause a notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon,* determine the issues and make findings of fact and conclusions of law with respect thereto.' (Emphasis supplied). In requiring a 'hearing', the Section 'has obvious reference to the tradition of judicial proceedings.' Cases cited footnote infra. *Respondent, denied an opportunity to be heard, 'has lost something indispensable, however convincing the ex parte showing.'* Cases cited footnote infra. We conclude that the District Court did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present." (Further emphasis supplied).

It is respectfully submitted that the Court of Appeals below seriously erred in failing to find that petitioners were entitled to a hearing on the issues not appearing of record.

5. The Court of Appeals for the Eighth Circuit seriously erred in failing to find that the information (see Appendix D), *as to Count one*, failed to charge a larceny of money which was insured by the Federal Deposit Insurance Corporation and in violation of the laws of the United States. That the statute (18 U.S.C. Section (a) sub-division (2)) as applied to Count one is unconstitutional.*

*Count two charging a violation of 18 U.S.C. Section 2113(b) was not challenged in the District Court, was not contested in the Court below and is not challenged here in this petition.

Count One of the Information Is Void on Its Face and the Statute Is Unconstitutional As Applied to Count One

The information filed by the United States Attorney failed to charge an offense under 18 U.S.C. Section 2113 (a) sub-division (2) (as applied to the information) and is unconstitutional in violation of the Fifth Amendment to the United States Constitution.

The statute upon which the information was based reads in words and figures, to-wit:

> "Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, *iwth intent to commit in such bank, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny* - - - shall be fined not more than $5,000.00 or imprisoned not more than 20 years or both." (Emphasis supplied).

The information filed by the United States Attorney attempting to charge a violation of 18 U.S.C. Section 2113(a) sub-division (2) reads as follows:

> "That on or about September 27, 1967, in the Western District of Arkansas, at Mena, Arkansas, Louis Ray Jones and Billy Don Thompson did unlawfully and feloniously break and enter, *with the intent to commit larceny*, a certain building occupied by the Planters First National Bank, Mena, Arkansas, the deposits therein being insured by the Federal Deposit Insurance Corporation, in violation of Title 18 U.S.C. Section 2113(a)." (Emphasis supplied).

Prior to 1948, the words "affecting such bank or savings and loan association and in violation of any statute of the United States" were no part of the statute. The amendment was made in response to a ruling of the United States

Supreme Court in *Jerome* v. *United States*, 318 U.S. 101. In that case an attack was made on the statute on the grounds that the proscription of the commission of a felony, any felony, not limited to the legislative powers of the United States, was in excess of the powers of Congress and an invasion of the United States' right and power to legislate under the 10th Amendment to the Constitution of the United States.

This Honorable Court, in saving the statute from a declaration of unconstitutionality, ruled in the *Jerome* case that inherent in the statute, before amendment, was the limitation that "any felony" so committed must be a felony in violation of the laws of the United States and did not apply to just *any* felony. Five years later, with full knowledge of the decision of this Honorable Court in *Jerome* the amendment was made to read:

> "Any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny."

It thus becomes apparent that the limitation put on other felonies was not put on the commission of the larceny, and that the larceny need not be in violation of any statute of the United States, but could be a larceny in violation of the common law or as defined by statutes of the States.

It is our submission that the statute as it attempts to sanction an entry into a bank, or savings and loan association only the deposits which are insured by the Federal Government, and the larceny not being limited to such deposits, is an attempt to legislate by the Congress in excess of its power granted by Article I, Section 8, Clause 18 of, and in violation of, the Tenth Amendment to the Constitution of the United States.

The federal qualifications on felony being omitted from "any larceny" entry onto privately owned property to commit the larceny, solely offensive to local law, is, within the purport and language of the Section, as amended in 1948, violative of the limitations of powers granted to Congress under the Constitution and its amendments.

The limitation inaugurated in the *Jerome* case can no longer be ascribed to Congress in its legislation subsequent to the *Jerome* case, where the Congress articulated the limitation on other felonies, but allowed the larceny provisions to continue unfettered.

> "It is well-settled that 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.' *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L. Ed. 1345. As we pointed out in *Girard Inv. Co.* v. *Commissioner*, 3 Cir., 122 Fed. (2d) 843, 845, 846, words may be interpolated in a statute '* * * only when the statutory language is equivocal or where literal interpretation leads to absurdity' so gross as to shock the general moral or common sense. See *Fides* v. *Commissioner*, 4 Cir., 137 Fed. (2d) 731. In its most recent ruling on the subject of statutory construction, the Supreme Court in *Crane* v. *Commissioner*, 67 S.Ct. 1047, 1051, stated: 'In the first place the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses. * * * strong countervailing considerations would be required to support a contention that Congress, in using the words "property" meant "equity" or that we should impute to it the intent to convey that meaning.'
>
> In *Caminetti* v. *United States*, 242 U.S. 470, 37 S.Ct. 192, 196, 61 L. Ed. 442 L.R.A. 1917 F. 502 Ann. Cas. 1917B, 1168, the Supreme Court held that language * * * must be taken as the final expression of

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> legislative intent and * * * (is) not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source."
>
> *Hatfield, Inc.* v. *Commissioner of Internal Revenue*, 162 Fed. (2d) 628-631.

To illustrate our contention on this point, we remind the Court that only the funds of the bank were insured by the Federal Deposit Insurance Corporation. The furniture, the equipment, the pens, the building, everything other than funds are privately owned. There is no area where the Federal Government may legally legislate other than in regards to the insured funds. Yet if entry is made into the bank to snatch a ball point pen, to pick a pocket, Congress has, by the second paragraph of Section 2113(a), said a federal crime has been committed. *This is beyond the power of Congress.*

In the case at bar the Statute 18 U.S.C. Section 2113 (a) sub-division (2) invokes criminal intent, that is to say, "with intent to commit in such bank * * * any felony affecting such bank * * * and in violation of any statute of the United States, or any larceny."

The larceny as charged in Count One of the information merely mentions that after petitioners broke and entered the bank it was with the intent to commit larceny. There is no charge that petitioners' intent to commit larceny (was a larceny affecting such bank and in violation of the statutes of the United States). Therefore, in absence of the charge that petitioners entered the bank *with the intent to commit a felony or larceny affecting such bank, the deposits which were insured by the Federal Deposit Insurance Corporation,* no offense against the laws of the United States was charged in Count One of the in-

formation and the sentence of twenty (20) years must be vacated and Count One of the information dismissed.

To be more specific petitioners point out that under the statute in question it is not the entry of the bank that is punishable, it is the *intent* to commit any felony or larceny affecting such bank and in violation of any statute of the United States, i.e., against the deposits which are federally insured. "Intent shows the presence of will in the act which consummates the crime." See Black's Law Dictionary, Fourth Edition, p. 947.

It is respectfully submitted that the statute under which the information was drawn (as applied) is unconstitutional in that the larceny as charged in the information could be a larceny in violation of the common law as defined by the statutes of the State of Arkansas.

PRAYER FOR THE WRIT

It is respectfully submitted that a writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

LOUIS RAY JONES,
#18788-175, Box 1000,
Leavenworth, Kansas 66048,

BILLY DON THOMPSON,
#84483-132, Box 1000,
Leavenworth, Kansas 66048,
(*Bill Don Thompson pro se for Louis R. Jones*).

Dated: May, 1970.

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VERIFICATION

United States of America

Federal Penitentiary,

Leavenworth County, Kansas—SS.

Billy Don Thompson, being first duly sworn, deposes and says that he is one of the petitioners named in the petition for Writ of Certiorari and he has read and knows the contents of same; the same is true and correct to the best knowledge and belief of this affiant.

Affiant further says that he is proceeding pro se and pro se for Louis R. Jones a co-defendant and co-petitioner in this cause of action.

Further Affiant Saith Not.

/Signed/ BILL DON THOMPSON
BILLY DON THOMPSON, Affiant

Subscribed and sworn to before me this ..... day of April, 1970.

.....
United States Parole Officer

APPENDIX A

Opinion of District Court

(Note)

Petitioners were unable to obtain the Memorandum Opinion written by the Honorable Paul X. Williams in Civil No. FS-69-C-1. The Clerk of the District Court at Fort Smith, Arkansas, advises that no such an order was ever entered. However, the Clerk has deliberately withheld the memorandum order in that such an order was made and from that order the petitioners perfected their appeal to the Court of Appeals for the Eighth Circuit.

(Signed) Louis R. Jones
Billy Don Thompson
Petitioners

APPENDIX B

Opinion of Court of Appeals for the Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,687

Louis Ray Jones and Billy Don Thompson, Appellants, vs. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Arkansas.

[December 24, 1969.]

Before MEHAFFY, GIBSON and HEANEY, Circuit Judges.

GIBSON, Circuit Judge.

This is an appeal from the District Court's denial without hearing of the motion of petitioners Jones and Thompson under 28 U.S.C. § 2255 to vacate judgment and sentence against them and to discharge them from custody.

Petitioners, who were known to the police, were arrested shortly after 9:00 a.m. on September 28, 1967. Police officers observed them leaving a wooded area in a strange automobile, which they drove away at an illegally high rate of speed. The police pursued them but when a tire on petitioners' car blew out they were forced to abandon the vehicle. They fled, escaping temporarily.

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In the car the police discovered several American Express money orders from a recently burglarized bank as well as a shovel covered with fresh dirt. The police returned to the wooded area where Jones and Thompson had first been seen and there, in a freshly dug hole, discovered additional loot from the bank robbery including money and money orders. Jones and Thompson were arrested shortly thereafter.

At arraignment each petitioner waived indictment and pleaded guilty to violations of 18 U.S.C. §§2113(a) and (b), robbery or larceny from a federally insured bank. Petitioners also pleaded guilty to several indictments outstanding against them in other districts but transferred to the Western District of Arkansas under Rule 20 Fed. R. Crim. P. Jones was charged with three separate offenses transferred under Rule 20 for crimes committed in Texas, Louisiana and Missouri; Thompson with two in Texas and Louisiana. They were each subsequently sentenced to 20 years in prison for violation of 18 U.S.C. §§2113(a) and (b), and in addition each received several five-year terms in connection with the indictments transferred under Rule 20, which sentences were set to run concurrently with their 20-year sentences. However, both were sentenced under the indeterminate sentence procedure of 18 U.S.C. §4208 (a)(2), making them "eligible for parole at such time as the board of parole may determine."

On appeal the petitioners contend: (1) 18 U.S.C. §2113 (a) is unconstitutional and thus count one of the information under which they were prosecuted is void; (2) they were never properly informed of their right to plead not guilty to the information filed charging violation of 18 U.S.C. §§2113(a) and (b); (3) they were improperly informed of the potential maximum length of their sentences; (4) the Court failed to properly advise them in the

Rule 20 proceedings that they had a right to plead not guilty and in the event a not guilty plea was entered the cases would be returned to the districts of origin; and (5) they were improperly denied a hearing on their §2255 motion.

1. Petitioners contend 18 U.S.C. §2113(a) is unconstitutional because it makes a federal offense of "any larceny" committed in a federally protected bank and in so doing exceeds the constitutional powers of the United States Congress. Petitioners cite *Jerome* v. *United States,* 318 U.S. 101 (1943) for this proposition. But *Jerome* is not in point. In *Jerome* the Court made no constitutional determinations, but rather construed the phrase "any felony" (committed in a federally protected bank), as it appeared in the statute, to mean only felonies already proscribed under federal law and affecting banks protected by the Act, on the ground that courts should not infer a congressional intent to incorporate state criminal law unless such an intent is clearly stated in the legislation. Thus, *Jerome* does not stand for the proposition that Congress is without power to prohibit "any felony" occurring within a federally protected bank. *Jerome* decided no constitutional issues nor considered any limitations on congressional power, but was concerned only with a statutory construction issue.

Congress is not without power to prohibit "any larceny" (a much more restrictive phrase than "any felony") occurring within a federally protected bank. This Court has upheld the constitutionality of §§2113(a) and (b) in *Smith* v. *United States,* 356 F.2d 868 (8th Cir. 1966), cert. denied 385 U.S. 820 (1966), and petitioners' contention is devoid of any merit. They admitted burglarizing the bank, taking money, coins, and money orders, and their acts fall within the clear purview of the statute.

2. The petitioners contend they were not properly informed of their right to plead not guilty and in fact claim

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they thought a guilty plea was mandatory since they had previously confessed and waived indictment. This contention is without merit. Petitioners are reasonably articulate, sophisticated young men with extensive criminal records and criminal experiences, not likely to be unaware of the right to plead not guilty.

Jones retained private counsel and Thompson had counsel appointed by the Court. Both were ably and in fact diligently represented at all court proceedings. Their attorneys intelligently protected their rights, particularly in regard to sentencing, and made effective pleas for leniency.

It is incredible to suppose that these same attorneys never discussed with petitioners the alternatives of pleading guilty or not guilty, or their respective chances before a jury or a court on the charges contained in the information. Attorneys in criminal cases are retained or appointed for the purpose of providing consultation, evaluation and advice, along with carrying out the duties of representation at the criminal trial. The attorneys, both employed and appointed, were adequately qualified to serve the petitioners' interests and the record reflects that they did so in a diligent and professional fashion. Thus, the petitioners were fully aware of their alternatives. Judge Williams carefully explained all of the charges to each petitioner as well as the possible sentences, and he was most careful to determine that the petitioners understood the effect of pleading guilty and that the petitioners had in fact committed the acts for which they admitted being guilty. Finally, the Judge carefully asked each defendant how he pleaded, and each answered guilty.

The case of *McCarthy* v. *United States*, 394 U.S. 459 (1969) has laid down strict instructions requiring judges to follow Rule 11 carefully and to compile a record to show that Rule 11 was complied with. Although *McCarthy* is not applicable to this case since it does not apply retro-

actively, *Halliday* v. *United States*, 394 U.S. 831 (1969), we believe Judge Williams substantially complied with its commands.

The defendants contend they should have been specifically informed of their right to plead not guilty. This is not required by Rule 11, but defendants knew of this right and it was further made clear to them by their counsel, by the Judge when he informed them of their right to stand mute and to say nothing which could be used against them, and by implication when he asked the question, "How do you plead?"

A reading of the record discloses the frivolity and shallowness of petitioners' contentions. Petitioners were told by the Court that they had a right to have their bank burglary charge submitted to the Grand Jury or they could waive that right. Each consulted with their respective counsel and waived. They then were told by the Court before entering the plea: "Now as I stated before it is possible for each of you should you plead guilty to both charges that a maximum fine of $10,000, $5,000 in each case, could be assessed against you and imprisonment of 30 years could be assessed against you, 20 years on Count 1 and 10 years on Count 2 * * *." This very language shows quite simply and plainly that they were not compelled to plead guilty. They were then separately asked "How do you plead?" Both pleaded guilty, freely admitting the charges and denying any threats, inducements, or rewards to plead guilty. This again shows they were presented with a choice of pleading guilty or not guilty. Counsel for each concurred in the petitioners' pleas and told the Court, that each client comprehended the nature of the charges and the effects of a plea of guilty.

3. Petitioners assert that their respective pleas of guilty are invalid, being the result of misinformation as to the maximum length of their sentences. It is true that the

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Judge erred in indicating a 30-year sentence was possible under the original information, 20 years on count one under 18 U.S.C. §2113(a), and 10 years on count two under 18 U.S.C. §2113(b). *Prince* v. *United States*, 352 U.S. 322 (1957) ruled that the maximum sentence possible under this statute is 20 years. However, this issue was broached by one of the attorneys at the time Judge Williams was discussing the penalties with the defendants and, though the matter was not settled at that moment, it is evident the petitioners were aware of the correct maximum sentences which they could receive under each count, and knew their counsel were contending that the lesser count was included in the greater.

Petitioners' attorneys correctly pointed out to the Court that the maximum was 20 years. It is also patently evident from the record that petitioners' guilty pleas were in no sense the result of the judge's error and thus petitioners were not misled or prejudiced by it.

4. Petitioners' contention that their constitutional rights were violated because the judge in the Rule 20 proceeding did not tell them they had a right to plead not guilty is frivolous. Rule 20 in part reads:

> "(a) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held, . . ."

The Court, for obvious reasons, can accept only, a plea of guilty or *nolo contendere* in a Rule 20 proceeding. The whole proceeding is designed to aid the criminal defendant in disposing of criminal charges from other federal jurisdictions that would demand the defendant's appearance at

a trial or else remain pending during the defendant's incarceration and thus serve as an obstacle to a favorable consideration for a parole. A defendant requests the Rule 20 proceeding in writing and should not be heard to contend that he requested the accommodation for the futile purpose of transferring criminal charges from one jurisdiction to another and then back again. Of course, he may change his mind and enter a plea of not guilty and under Subsection (c) of Rule 20 the criminal charge would be transferred back to the place of origin and the defendant still would then be confronted with the obligation of meeting the charge at some future date. However, if the defendant initially intends to plead not guilty to a criminal charge transferred under Rule 20, no purpose whatever is served by his requesting the Rule 20 proceeding.

5. Finally, petitioners contend that the District Court abused its discretion in failing to grant them a hearing on their §2255 motion. The Supreme Court viewed this same issue in *Hodges* v. *United States*, 368 U.S. 139 (1961) holding at 362, "• • • that in any event this was a case where no hearing was required under the statute, because 'the files and records of the case conclusively show' that the petitioner was entitled to no relief." We think the present case was a proper one for denial of a hearing. Several issues involved no disputed facts. As to the other issues, the record is clear that petitioners were deprived of no substantial rights.

Judge Williams was well within the limits of his discretion in denying a hearing, as the files and records conclusively show that petitioners were not entitled to any relief.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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APPENDIX C

Order Extending Time

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1969

LOUIS RAY JONES AND BILLY DON THOMPSON,
Petitioners,

vs.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 24, 1970.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 18th day of February, 1970.

APPENDIX D

18 U.S.C., Section 2113(a)(2) and (b)

18 U.S.C. Section 2113(a), Sub-Division (2):

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such

savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny.

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. Section 2113(b):

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both;

APPENDIX E

Rule 20, Federal Rules of Criminal Procedure

RULE 20

Transfer from the District for Plea and Sentence

(A) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held, subject to the approval of the United States Attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the Clerk of the Court in which the indictment or information is pending shall transmit the papers in the proceedings or certified copies thereof to the Clerk of the

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Court for the district in which the defendant is held and the prosecution shall continue in that district.

* * *

(C) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the Clerk shall return the papers to the Court in which the prosecution was commenced and the proceeding shall be restored to the docket of that Court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

* * *